CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1829.

KIRKLAND vs. HIS CREDITORS.

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KIRKLAND
vs.
His Creditors

An opposition cannot be amended without leave.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court.

Ingram and Crofts filed their opposition to the tableau of distribution. This instrument is subscribed by Andrews, as the attorney of both.

Ingram complained he was placed as a simple creditor, while as joint assignee of Crofts of a mortgage given by the insolvent, he was entitled to a privilege or mortgage.

Crofts complained he was not on the tableau, although he was a creditor *in solido*, with Ingram.

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Several creditors opposed Ingram's pretensions on several grounds, one of which was that he was not a sole, but a joint assignee of the mortgage with Crofts.

Notice was accordingly given to Ingram of their opposition on the 31st of March, 1828, and on the 19th of July the case was heard and a decree was made, dismissing his claim without noticing Crofts'.

On Ingram's appeal the judgment was affirmed.

In the mean while, on the 18th of April, Crofts filed a separate opposition—urging he was never notified of the filing of the tableau, and the legal notice was not given to the creditors; therefore he was still entitled to his opposition, although ten days had elapsed since the filing of the tableau. He therefore concluded for the amendment of the tableau on a number of grounds.

The counsel for the syndic opposed his application as too tardy; because upwards of twenty days before the date of his last opposition he had filed one to the tableau: and therefore, having stated an objection to the tableau, he could not be heard in his allegation,

that he never had any notice of its being filed, and further, that notice to Ingram his joint creditor *in solido*, was sufficient.

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The court was of opinion that the opposition was not offered in time, and dismissed it. He appealed.

Appearance waves the informality of a citation. The appellant came in voluntarily and prayed to be named as a joint creditor with Ingram. He afterwards filed another opposition. As he did so without leave, it cannot be considered as an amendment of the first opposition, and as an original one it was too late.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts for plaintiff.

ROWLETT vs. *SHEPHERD.*

The notice in the 735th and 736th articles of the Code of Practice, is that which the Sheriff is to give to the defendant, before seizure.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

The plaintiff appealed from an order for setting aside a writ of seizure and sale.

The counsel for the defendant and appel-

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The act of 1828 has repealed those parts of the former laws which required an assignee to prove the consideration of the assignment before he obtained a writ of seizure.

The authority of a sworn attorney is always presumed.

The demand which must precede the seizure, is the only notice required before payment be enforced by a writ of seizure, by an assignee.

That part of the old code, which required the plaintiff's oath before a writ of seizure issued, is repealed.

lee urges that the writ was properly set aside —because,

1. Issued without any previous notice to the defendant.

2. The plaintiff was an assignee, and had no right to the writ, as he did not prove he had given any consideration to the assignor.

3. The authority of the plaintiff's agent was not shown.

4. No notice of the assignment had been given to the debtor.

5. The oath was not taken by the party, but by his agent.

I. On the first point, the Code of Practice, 735 and 736 is relied on. We think the notice there spoken of, is that which the sheriff is to give before a seizure. For the code requires, that besides the ordinary delay, the defendant should have further time, in proportion to the distance of the residence of the Judge to whom the petition is presented.

II. On the second, the counsel relies on *Nichols* vs. *De Ende, vol.* 3, 310. *Wray* vs. *King*, 10 *Martin* 220. *Cur. Phil. Executante, n.* 18.

In the first case, we held that when the

plaintiff is not the defendant's original creditor, he must produce authentic evidence of his own title to the debt; and on the other, that a writ of seizure and sale could not issue in favour of an indorser on parol proof of the indorsement. The *Curia Philipica*, indeed, requires that the plaintiff, before he obtains the writ, should prove the amount he paid to the assignor, in some other manner than the confession of the assignor. This we take to be a rule of practice which is now repealed by the act of 1828.

III. The same book requires the Judge, before he grants a writ of seizure and sale, to consider *si la execucion se pide, en virtud de poder del acreedor. Pedimiento, n.* 13. In the present case the petition is signed by a sworn attorney, who, till the contrary be proved, is always presumed not to act without being employed. *Hayes* vs. *Cuny*, 9 *Martin*, 87.

IV. The notice required by the Civil Code 613 to the debtor, of the assignment of the debt, has for its object, to prevent his paying it to the assignor, or the creditors of the latter from seizing it. The demand which must

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precede the seizure is the only notice required before enforcing payment by the assignee.

V. That part of the Civil Code 3361, which required an oath from the plaintiff is repealed by the Code of Practice 734, which provides that he may obtain a writ of seizure and sale on a simple petition.

We think the writ in the present case ought not to have been set aside.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, the writ of seizure and sale reinstated, and the case remanded for further proceedings according to law, the appellee paying costs in both courts.

Grymes for plaintiff—*Slidell* for defendant.

LACOSTE vs. *BORDERE & AL.*

A debt offered as compensation, must be as liquidated as the plaintiff's demand.

Reconvention must be, on matter necessarily connected with his claim.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The defendants and appellants, sued for the price of goods and merchandises purchased from the plaintiff, complain that the

parish court erred in disallowing their plea of compensation and reconvention.

They alleged that they heretofore were in partnership with the plaintiff, and that when the partnership was dissolved, they improvidently paid him a much larger sum than was due to him; that many of the debtors of the former partnership are insolvent, and the amount of good debts is much less than it appeared to be; so the plaintiff is bound to bear his proportion of the deficit.

We think the parish Judge did not err.

Compensation could not take place, because the claim of the defendants was not equally liquidated as that of the plaintiff. *Civ. Code*, 2205. 7 *Toullier* 444. The plea required the re-examination of the settlement of all the affairs of a partnership.

Reconvention could not be allowed because the claim of the defendants was not necessarily connected and incidental to that of the plaintiff. *Code of Practice*, 375.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

Canon for plaintiff—*Grymes* for defendants.

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PLAUCHE & AL. *vs.* GRAVIER & AL.

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The prescription of ten years must be on a just title.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This case was before us on the appeal of Gravier, *Vol.* 5, 597; the other defendants, third possessors of the lots which the plaintiff prayed the sale of, as mortgaged to him by Gravier, have appealed, and the case is before us on a bill of exceptions, taken by their counsel on the refusal of the district judge to charge the jury that the plaintiffs were barred by the prescription of ten years.

The appellants are in possession of the premises upwards of ten years: but they are without any written title thereto; they have indeed a title from Gravier to the two lots immediately in face of the premises, on the opposite side of the street, and in consequence thereof, and by his directions, took possession of the premises.

It is clear that this is no defence against the plaintiffs, who lent their money and took a mortgage on property which, according to the books of the recorder of mortgages, was un-

encumbered, and by an authentic act once belonged to him and was not alienated. The appellants had no just title and cannot prescribe.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Denis for plaintiffs—*Young* for defendants.

RUSSELL & AL. vs. *FERGUSON.*

APPEAL from the court of the first district.

A party is not obliged to accept several drafts for one debt.

The pleas filed by the defendants' counsel are supposed to be so with the assent of the client.

The general issue denies all the facts in the petition and the legal inferences resulting therefrom

PORTER, J. delivered the opinion of the court. The defendant was indebted to Shaumburgh, who gave two orders on him. One in favour of the petitioners for $250; the other in favour of C. Adams, jr. for $200 which has been endorsed to them. They were presented by the plaintiffs and payment refused, because the defendant had promised, previous to their presentation, to pay a creditor of the drawer.

The plaintiffs contend that the assignment of the debt to them and notice to the defendant, operated as a legal transfer of the sum for which the orders were given; and that

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there is no proof on record that the defendant was requested or authorised by the drawer to discharge the debt he owed to the creditors, for whose use the money was appropriated by the defendant.

This position would we are inclined to think be correct, if the case was before us on this ground alone. But the defendant contends that he could not be compelled to pay assignments of portions of the debt due by him, and this objection is certainly well taken. See *vol.* 5, 193, *King & als.* vs. *Havard.* 5 *Wheaton*, 277.

The plaintiff however contends that this is a defence made by the other party, interested in getting his claim paid, and that the defendant made no such objection when the draft was presented to him. This may be so in point of fact, but we cannot look beyond the pleadings and evidence. It is made here by his attorney on record, and until the contrary is shewn we must presume he has been acting correctly in pursuance of his instructions.

The answer denying that the defendant was indebted in any manner to the petitioners puts the point on which the case goes off at issue.

it denied all the facts in the petition, and all the legal inferences that could be drawn from them.

We conclude therefore that the court below erred in giving judgment against the defendant; and it is ordered, adjudged and decreed, that that judgment be reversed, and that there be judgment against the plaintiff as in case of non-suit, with costs in both courts.

Slidell for the plaintiffs—*Hoffman* for the defendant.

JOHN K. FERGUSON vs. *WILLIAM L. FOSTER.*

Plaintiff can not arrest the person of his debtor, and attach his property unless both remedies are necessary to insure the execution of the judgment.

A rule to shew cause why an order of arrest should not be set aside does not put the truth of the allegations contained in the affidavit at issue.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. On the petition filed in this case, a writ of attachment was taken out and levied on a steam boat. The boat, by agreement between the parties, was to run during the pendency of suit, and the profits to be applied to the extinguishment of the debt. After two trips had been made, the plaintiff filed a supplemental petition, stating that instead of any profit having accrued from this agreement, the boat had lost on each voyage; and a further sum of $185 63

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is demanded. The plaintiff also averred that the steam boat was incumbered by a heavy mortgage, and that he feared he would be deprived of the benefit of his attachment. He prayed that the defendant might be held to bail.

An order of court was given; the person of the defendant taken: and the question presented to our consideration is, whether under the circumstances just stated the plaintiff has a right to use both these remedies. On the hearing of a rule taken by the defendant to have the order of bail set aside, the court below sustained the objection to the correctness and l gality of the steps taken by the plaintiff, and made the rule absolute. From that decision the present appeal was taken.

The rules of practice furnished by the legislature give us no positive provision on this subject. The 208th article of the code of practice in speaking of the conservatory acts which the plaintiff may resort to, in order to give effect to the suit he is about to institute, states hat they may be used *either* against the person or the property. The defendant has urged, from this enactment being in the disjunc-

tive, that it was not the intention of the legislature that both should be exercised in the same action. But it appears to us that this provision was rather intended to mark out the extent of the remedy, by giving it against person and property, than to provide for the manner in which it should be used, and that little aid can be derived from it in deciding the point before us.

The question then is to be decided on general principles, and the best rule we can adopt, is that which will carry into effect the object for which the right was conferred.

It was given for the purpose of enabling the plaintiff to ensure the execution of the judgment he hoped to obtain, and whenever that can be secured by a resort to one of the remedies, the plaintiff should not be permitted to avail himself of both; because the making use of arrest and attachment would in such a case be oppressive to the defendant, without being useful to the plaintiff.

Laws which deprive men of the use of their property and their personal liberty, on the mere allegations of their adversary, supported alone by his oath, should be strictly construed, and

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he who claims the benefit of them should clearly establish his right to so severe a remedy. This rule increases in force, when he has already resorted to one means of giving effect to the future decree of the court; because the presumption of the necessity for further conservatory acts, is weakened by the security already obtained.

In the instance before us, the attachment was levied on a steam boat; if she afforded sufficient means of ensuring the execution of the judgment, the plaintiff had no right to arrest the person of the debtor. That she was of sufficient value to do so has not been denied, and the oath of the plaintiff to hold the defendant to bail, alleging solely as the ground for it, that she was encumbered with a mortgage, furnishes strong presumption that without this incumbrance she would have been sufficient.

The case then is narrowed down to an enquiry whether legal and adequate proof of the failure of the first remedy was offered. In ordinary cases it is enough for obtaining a writ of attachment, or an order for arresting the person of the debtor, that the plaintiff makes oath of the facts, and the defendant if he wish-

es to have the order set aside *must disprove them.* *Code of Practice*, 218.

But whether in a case such as this, where the plaintiff demands a double remedy, and is entitled to it only on special grounds, the defendant might not have put him on the proof of those facts which would authorise the issuing the order for arrest, after an attachment has been granted, may be well doubted. The pleadings in the inferior court however do not permit us to examine it. The affidavit of the plaintiff was sufficient in the first instance, and the rule taken did not put the verity of the allegations contained in it at issue. A call on the plaintiff to shew cause why the order granted should not be set aside, put the legality of the steps taken by the plaintiff on his own shewing alone at issue, and afforded him no notice to come prepared with proof to support them.

Assuming it therefore as a fact, that the property on which the attachment was levied, being incumbered with a mortgage, did not afford security for carrying into effect the judgment which the plaintiff expected to obtain, we think the court below erred in setting aside the order to arrest the person of the debtor.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that the case be remanded, to be proceeded in according to law, the appellee paying the costs of this appeal.

Hawes for plaintiff—*Christy* for defendant.

GABAROCHE vs. *HEBERT & AL.*

The answer of the plaintiff to interrogatories may be taken under a commission to examine witnesses.

An answer to interrogatories must be categorical, but it is immaterial in what language the answer is made.

An indorsement in blank does not prevent the indorsee from suing on it and recovering.

APPEAL from the court of the fourth district, the judge of said district presiding.

PORTER, J. delivered the opinion of the court. This action is brought against the maker and indorser of a promissory note. The petition states that the defendants are indebted to him, by one of them making his note in favor of the other who indorsed it: that the said note was duly protested for non-payment, of which the indorser had notice, which facts will more fully appear by the note and protest annexed as part of the petition.

The answer admits the execution and indorsement of the note as alleged; but avers that the maker was indebted to one Tate in the

sum of $1300 or thereabouts, and for the purpose of paying the same, an obligation was made in favor of the indorser for $1800 with a view to have it negotiated. The balance between the sum due and the amount of the note to be returned to the payor. That some time after the execution of this instrument the present plaintiff presented himself as the holder and proprietor of it. That the maker explained to him the circumstances under which it had been given, and refused payment unless credit for the excess was allowed. That the plaintiff promised to make inquiry in relation to the demand of the defendant, and if found true that credit should be given. Upon which the maker, relying on the honesty and good faith of the plaintiff, made several payments, and gave the note on which this suit is brought for the balance, under the stipulation however that the difference between the sum originally due by Tate and the first note for $1800 should be deducted from it.

The answer avers further, that the plaintiff cashed the note for $1800, at a discount greater than the legal interest, and demands credit for the excess.

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With these admissions, there is a general denial of all the allegations in the petition, and the answer concludes by averring that on the plaintiff's own shewing he is not entitled to judgment.

Annexed to the defence were the following interrogatories, the materiality of which were sworn to, and their answers ordered by the court.

1. Are not the facts stated in this answer true, as far as they come within your knowledge?

2. Say which of them are not true that are within your own knowledge?

3. State which of them are not within your own knowledge?

4. Do you know, and if you do, say at what discount the note of $1800 was discounted?

To the answers filed to these interrogatories the defendant excepted.

1. Because the commission to take said answer did not issue in the proper form, and should not have been a general commission to examine all witnesses.

2. Because the answers to the first and fourth interrogatories are insufficient and evasive.

I. The first objection cannot be supported. We can discover nothing in the form in which the commission issued, that renders the testimony taken under it illegal. A commission to examine *all* witnesses, will authorize the examination of *one*, for in that light must the plaintiff be considered when the defendant calls for his testimony.

II. The answer to the first interrogatory appears to us to be full and explicit; but that given to the fourth requires a more particular examination.

The question asked is, "Do you know, and if you do, say, at what discount the note of $1800 was discounted?" The answer is, "I took the note of $1800 in payment of a debt as value to the amount specified in its face."

The judge of the first instance thought the answer evasive, but he refused to sustain the exceptions; because taking the interrogatory as confessed it afforded no matter of defence of which the defendant could avail himself. The reasons for the opinion are spread at length on the record. That on which the decision is principally based is the fact of the plaintiff having renewed the note. The judge thought

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that by doing so the validity of the first note was acknowledged. That the defence of usury should have been made to it: that the plaintiff by the acquiescence of the defendant had lost his recourse against the endorser, and that it was now too late to urge this objection.

We have come to the same conclusion with the judge *a quo*, but for a different reason. We do not think the answer evasive. The plaintiff is interrogated if the note was discounted, and at what rate? He answers that he took it in payment of a debt for the value specified on its face. This certainly is as complete a negative as could be given to the interrogatory; for if he took it in payment, for the value expressed, then it was not discounted. Reliance has been placed on that article of the code of practice, which requires a categorical answer to interrogatories. Whenever the question put, can be affirmed, or denied, the answer must furnish an affirmance, or denial. But the law requires no particular language in which that affirmation, or denial, should be couched. It is sufficient if either one or other clearly and necessarily results from the answer made. That there was necessarily a re-

gative here, we have no doubt. If a party were interrogated, whether he was or was not in New-Orleans, on a particular day, it surely would be equivalent to a direct denial if he should reply, that on the day stated he was in Philadelphia.

It has been objected, that it is not stated in the petition that demand was made at the place where the note was made payable, and that such an averment andp roof to support it, were necessary to enable the plaintiff to recover. If the petition was defective in this point, and the proof failed to establish the fact, the objection would be a good one; but on examining the pleadings we find that the protest of the notary is made a part of the petition, and that the protest was given in evidence.

In the instrument *making a part of the petition*, there is an express averment, that demand was made at the place where the note was payable. There is therefore no ground for the objection that there is no such demand set out *in the petition.*

Another objection has been taken, that the plaintiff's endorsement is on the back of the note; but that endorsement is in blank, and it

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has been decided in this court that such an indorsement is not a bar to the holder's suing and recovering on it. *Sprigg* vs. *Caney's heirs, ante* 253.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Hiriart for plaintiff—*Pierce* for defendants.

CHEW vs. *CHINN.*

If a suit be irregularly commenced in the *juicio executivo* and afterwards turned into the *juicio ordinario*, the plaintiff tho' he should succeed, must pay the costs of the executory proceedings.

Parol evidence is admissible to shew a payment was made, *in a note*, where the receipt in writing expressed generally that the debt had been paid.

APPEAL from the court of the third district, the judge of said district presiding.

PORTER, J. delivered the opinion of the court. The plaintiff commenced this action by an injunction praying to arrest an order of seizure and sale which the defendant had obtained against him. The grounds laid in the petition are: various informalities in the proceedings, and the sum due being less than that for which the order issued.

There are only one of these objections which require particular notice from the court.

The defendant owed the sum of $18,000, payable in three equal instalments. The two first were settled and discharged by payment

and a note of the defendant's for $1741 75. This note, together with the last instalment of the $18,000, were transferred to the plaintiff, and the order of seizure and sale was granted by the court for the balance alleged to be due on the obligation for $6000 secured by authentic act, and the note of $1741 75 *sous seing prive.* In this we think there was error. The note last mentioned, given and accepted in discharge of the balance due on the second instalment, was a personal not an hypothecary obligation, and did not enable the holder to enforce it by the executory process.

The defendant however urges that these irregularities are no longer a subject ofexamination, because the parties have joined issue on the allegations contained in the petition for an injunction: The suit has been turned from the *juicio executivo* into the *juicio ordinario;* there has been a trial on the merits, and judgment.

This position is correct so far as to prevent the subsequent proceedings in the *juicio ordinario* from being irregular, in consequence of the illegal manner in which the *juicio executivo* commenced. But it would be unjust and

When a debt is assigned as collateral security, the holder becomes agent for the collection, and the nett amount after deducting costs and other charges should be credited.

If counsel make a personal contract for their fee with the assignor of a debt they can not claim payment from the assignee.

An assignment of a mortgage debt, does not carry with it a promise to pay ten per cent. to the transferor for an extension of credit which had expired at the time of the transfer.

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contrary to law to make the plaintiff responsible for the costs occasioned by the defendant taking out an order of seizure and sale when he was not entitled to it. They must be borne by the party through whose fault they were occasioned.

On the trial of the merits, the court below gave judgment against the plaintiff in injunction for the sum of $2,977 5, with interest thereon from the 3d of July, 1827, until paid, rejecting the note of $1741 75. With this judgment both parties appear to be dissatisfied. The plaintiff has appealed from it; and the defendant has prayed that it may be so amended, as to include the note still due for the balance of the second instalment.

A bill of exceptions was taken by the defendant to the rejection of a witness to prove that the note of the plaintiff for $1741 75 grew out of the mortgage transaction, and was in part payment of the second instalment. The court would not admit the evidence, because it contradicted the receipt of the former holder of the obligation that it had been paid. That receipt on referring to it does not state in what manner the payment had been made, and tho'

strictly speaking the acceptance of a new debt for the old was rather a novation, than a payment, yet we know that in common understanding, where a note is given for another debt which by agreement of parties is to be extinguished by it, that this extinguishment is considered by them as a payment, and called such. We therefore think the court erred in rejecting the witness. His testimony was not offered to prove that no payment had been made, but the manner in which that payment had been effected. It did not in any manner contradict the receipt, nor impair its legal effect. As it did not, it is unnecessary to remand the cause to procure the proof; for had it been received, the legal rights of the parties would have been the same, as they are now presented without it.

The principal questions in the cause, relate first to the alleged error of the court in not giving judgment for this note, and second in not allowing sufficient credit to the plaintiff in injunction on the payments made by him.

As the latter form the ground of complaint of the appellant, they will be first examined.

The plaintiff previous to the assignment of

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his obligation to the defendant, had placed in the hands of Johnson the assignor, as collateral security a debt of one Balfour, secured by mortgage. The collection of this debt was attended with considerable difficulty, and suits of different kinds grew out of the attempt to enforce its payment. The defendant in giving credit for the moneys made has deducted the costs of court, and the fees paid to counsel for advice, and other professional services attending the collection. Of this the plaintiff complains. He insists that the whole amount received should be credited to the obligation due by him, and that the sums expended in collection should be considered as a personal obligation on his part. On general principles this demand is certainly unfounded. When a debt is assigned as collateral security, the holder becomes agent for the collection, and the nett, not the gross, sum should be credited, as was decided in the case of *Johnson & al.* vs. *Sterling*. 3 *n. s.* 486.

But in this instance part of the fees deducted stand on particular grounds. One of them, that to Turner, never has been paid. The assignor of the debt, Johnson, swears that when

he employed him he told him the plaintiff in this suit would pay him, and that if he did not he, Johnson, would. There is no ground then for deducting the amount due Turner. It is either a debt of the plaintiff's or Johnson's; nothing shews the defendant to be responsible for it. Another deduction made for the fee paid to Woodruff is also specially circumstanced. He swears that he was employed by the plaintiff. Now if counsel make a personal engagement with a party interested in a suit, and on his request appear in it, they have no right to demand payment for their services from another party to the action who may be benefitted by them. The promise therefore by the defendant to pay the counsel after he had been engaged by the plaintiff, and the subsequent payment, were entirely gratuitous, and though they may furnish him with a claim for reimbursement from plaintiff for money paid and expended for his use, the sum thus paid does not form a portion of the expenses necessarily incurred in the collection, and did not authorize him to divert the application of the funds in his hands from the extinction of a debt which the plaintiff had a greater interest to discharge.

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With regard to the other fees and expenses, the evidence does not shew any thing which takes them out of the general rule, and they were therefore properly deducted in the court of the first instance. *C. Code*, 2153.

The next question in the cause is the right of the appellee to have the judgment below so amended as to give him a judgment for the note of $1741 75.

We think it ought. The note it is true is only put at issue for the purpose of ascertaining whether the order of seizure and sale properly issued. But as the proceedings were afterwards turned into the *juicio ordinario*, judgment should be given for the creditor in that right in which the evidence shews the money to be due. The proof established that the note is due and unpaid.

The plaintiff requires interest at ten per cent, in consequence of an engagement entered into by the plaintiff with Charles G. Johnson, in 1821, in which he promised that in case the credit of the three notes then due by him were extended one year he would in lieu of $6000 pay at the end of each annual instalment the sum of $6600. In the contract there is a

clause "that nothing therein contained shall in any manner interfere with, invalidate, or prejudice the mortgage with which the full and final payment of the said sums is secured."

The assignment to the defendant acknowledges the receipt of $6000, and transfers to him all the assignor's interest *in the mortgage.* We do uot think that by this contract, the obligation to pay $600 for indulgence which had expired before the assignment, conveyed to the defendant the transferor's interest in a personal debt.

We can discover no error in the judgment of the court below in relation to credits, or calculation, except in the deduction of the fees of Turner and Woodruff, which appear to be $330 10.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that the defendant do recover from the plaintiff the sum of two thousand six hundred and forty-six dollars ninety-four cents, the balance due on a note of Samuel Chew in favor of Charles G. Johnson, dated the 7th Nov. 1818, and paya-

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ble on the first day of February, 1822, for $6000, secured by mortgage of date the 7th of November, 1818; and it is further ordered that the premises hypothecated to secure the payment of said note be seized and sold to satisfy this judgment.

It is further adjudged and decreed, that the defendant do recover of the plaintiff another sum of seventeen hundred and forty-one dollars seventy-five cents, with interest from judicial demand; the costs incurred by the taking out the order of seizure and sale, and those of appeal, to be paid by the appellee. The other costs in the cause to be paid by the appellant.

Turner for plaintiff—*Watts* for defendant.

KENNER & AL. vs. THEIR CREDITORS.

A bill at sixty days sight, accepted payable sixty-three days from the date of the acceptance, is accepted according to its tenor and is to be protested on the sixty-third day.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. Hicks, Lawrence & Co. opposed the homologation of the tableau of distribution, on the ground that they were not placed thereon, as creditors for the amount of a protested bill

of exchange, drawn by the insolvents. The opposition was overruled, and the opposing party appealed.

The bill, which was at sixty days' sight, was accepted on the fourteenth of September 1825, *payable on the fourteenth of November* following, and protested *on the latter day.*

The appellees' counsel urge that the appellants lost their recourse on the drawer: because

1. The acceptance was contrary to the tenor of the bill, being for payment on the sixty-third instead of the sixtieth, day after sight.

2. The protest was made on the day of payment, instead of the last of the days of grace.

Both of the objections will be disposed of by the solution of the question: Was the fourteenth of November (the day stated in the acceptance) the peremptory day of payment, or that from which the days of grace were to be reckoned? or, in other words, were the days of grace included between the day of acceptance and the fourteenth of November.

If that day was the peremptory one, and those of grace were included, then was the acceptance according to the tenor of the bill.

Then, was the protest timely.

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Both parties admit, that all questions relative to the acceptance and protest of a bill of exchange are to be determined according to the law of the country in which it is accepted and protested.

In the present case, the bill was accepted and protested in England, and the laws of that country afford the only legitimate rule of decision.

These laws being here foreign laws, must be proved as facts, by testimony or documents.

For these purposes, the appellants have introduced the depositions of nine witnesses, conversant in banking business, at the place on which the bill was drawn.

1. Hall, the first of these, deposes, that a bill at sixty days' sight, and accepted in the following form, "accepted, payable on the tenth of September, Liverpool, July 12, 1825," can be protested, according to commercial usage, on the thirteenth of September. He would reckon sixty-three days from the twelfth of July, the day of acceptance.

2, 3. Henderson and Orford testify, the bill the first witness speaks of would be irregularly accepted. According to commercial usage,

it should be protested on the thirteenth of September.

4. Gordon says, such an acceptance would be irregular and contrary to commercial usage. If he had a bill thus accepted, he would present it on the tenth, and again on the thirteenth, and protest it on the latter day.

5, 6. Anderson and Luke deposed as the first witness.

7. Binns thinks the bill should be protested according to commercial usage on the 13th.

8. Ireland testified to the same purpose, adding, the words, "payable on the 10th of September," was surplusage.

9. Highfield viewed them likewise as surplusage.

These gentlemen may well consider the words "payable on the 10th of September," as useless or superfluous, for the acceptance would have precisely the same meaning and effect if they were omitted. The drawee is required to pay sixty days after sight, the bill is presented on the twelfth of July, and he accepts it to pay on the 10th September, i. e. as he is required, on the sixtieth day after presentation. But surplusage does not vitiate an act; *utile per inu-*

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tile non vitiatur; and authorities have been cited, which have not been contradicted, that there is no form of acceptance established or required, by the law of England.

We conclude from the examination of the appellees' own witnesses on this point that it does not result therefrom that a dated acceptance is vitiated by the express designation of a day of payment, when that day is designated according to the tenor of the bill.

We cannot comprehend what Gordon, the fourth witness, means by saying he would present the bill on the tenth, and again on the thirteenth, and protest it on the latter day. We cannot see of what use the presentation on the tenth could be, when not followed immediately by a protest.

The same witnesses have been next examined, by the appellants, in regard to a bill at sixty days' sight, accepted on the ninth of July, payable on the tenth of September. The difference between the bill in regard to which the witnesses were first examined and that now to be considered is, that in the former the day expressly designated in the acceptance was the sixtieth, and the other the sixty-third; in the

one case the nominal, in the other the peremptory day of payment.

1, 2, 3, 4, 5, 6. Six of the appellees' witnesses, Hall, Gordon, Anderson, Binn, Luke, and Highfield, suppose the latter bill ought to be protested on the tenth day of September, the day designated in the acceptance.

7. Henderson thinks it should, *if the days of grace were included.*

8. Ireland deposes he would consider the words, "payable on the tenth of September," as surplusage, and would protest on that day.

9. Orford deems the acceptance irregular, and should think the acceptor had *included the days of grace*, and would protest on that day.

Thus, from the unanimous opinion of the nine witnesses introduced by the appellees, with the exception of the seventh, Henderson, who speaks hypothetically, it follows from a comparison of the tenor of the bill, the date of the acceptance and the day designated for payment, the latter is the third after the expiration of the days after sight: the day thus designated is the peremptory day of payment.

In such a case the acceptance is according

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to the tenor of the bill, and the protest made on the day expressly designated is timely.

Our attention has, however, been drawn by the counsel of the appellees to a vast number of British, American and French authorities, from a careful examination of which it appears to us that the counsel are correct in their assertion that there is no express form, established or prescribed by the English laws; but the proposition that the words "payable on the — day of ———," added between the words "accepted" and the acceptor's signature or date, are to be rejected as surplusage, must be confined to cases in which the day designated appears to be the nominal day of payment—because their insertion has then no effect—that when that day, from a like comparison, appears to be the peremptory day of payment, they have the effect of shewing that the days of grace have been included; and thus when the day thus designated does not appear to be either of these days, as, when in a bill at sixty days sight, another than the sixtieth or sixty-third day is stated, the words "payable, &c." have the effect of controlling the acceptance, by shewing that it is not the intention of the drawee to accept it according to its tenor.

When the contrary does not clearly appear, protests must be viewed as having done *id quod plurimum fit*, and an instrument must be construed, if circumstances do not demand a contrary construction, *ut res magis valeat quam pereat*, and if the expressions used be susceptible of two meanings, the construction must be against the party who used them.—*Verba fortius accipiuntur contra proferentem.*

We conclude that the holders of the bill did not discharge the drawers by receiving the drawees' acceptance, because it was according to the tenor of the bill, which was protested in due time.

We think the parish judge erred in disallowing the appellants opposition to the tableau.

Judge Mathews, whose indisposition has deprived us of his presence in court for some time past, attended the conference of the judges in this case, and authorises us to say that he concurs in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and proceeding to pronounce the judgment, which in our

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opinion ought to have been given in the parish court; it is ordered, adjudged and decreed, that the appellants' opposition be sustained and that they be placed on the tableau as creditors for the amount of the bill and charges consequent on the protest, the appellees paying costs in this court.

Hennen for plaintiffs, *Livermore, Morse and Smith* for defendants.

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When the original has not been in possession of the party offering the copy, the proof of loss which will authorize the introduction of the latter as evidence, must depend on the particular circumstances of the case.

The law presumes the husband the father of the children born during marriage.

Appeal from the court of the eighth district, the judge of the third presiding.

PORTER, J. delivered the opinion of the court. This is an action by a mother against her daughter. The petitioner claims a slave and five children, which she alleges she purchased in the year 1812, and possessed them for a long time after: that the defendant has taken them into possession and refuses to deliver them up.

The defendant pleads the general issue; avers that she has a good title to the property sued for, that the slaves were purchased in

trust for her; and finally that she has held them five years previous to the institution of this suit, in virtue of a just title, and with good faith.

In case of voluntary separation access is always presumed unless cohabitation has been physically impossible.

The condition of a child born during marriage can not be affected by the declaration of one or both the spouses.

The cause was submitted to a jury in the court of the first instance, who found for the defendant; judgment of non-suit was rendered against the plaintiff, after overruling a motion for a new trial, and she appealed.

The plaintiff appears to have been married three times. After living one or two years with her first husband, Sims, a voluntary separation took place between them, and he removed from that part of the country in which they had resided. Subsequent to this removal the defendant was born, the alleged fruit of an illegitimate connexion of the plaintiff with one Laurens. They lived together and cohabited until ten years had elapsed from the time Sims was heard of, when they were married. This marriage was preceded by a contract, in which among many other stipulations, it is stated, that the slaves which form the object of this suit should be secured to the petitioner; after which follows that clause in the contract under which the defendant sets up title to them,

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"which said mulattress named Sally, with her three children and their issue, the said parties agree respectively to secure to their natural daughter, named Delphine, her heirs and assigns forever." This contract was dated in 1816. In 1825 the defendant intermarried with A. Penne, and the slaves were sent or permitted to be removed to the house of the plaintiff.

On the trial below an objection was made to reading in evidence the copy offered of the contract of marriage, in which the clause just set out is found. It appears from testimony taken on this objection, that a very irregular practice has prevailed in the parish of St. Tammany of recording all original acts in a book of record, and after recording them to hand back the originals to the parties. The witnesses mentioned in the copy were called into court and they deposed, that they had attested a contract of marriage between the plaintiff and Laurens which was passed, or acknowledged before the parish judge. Notice was given to the plaintiff to produce the instrument. The defendant's husband swore that the contract was not in his possession nor in that of his

wife; that he did not know where it was---that it was not in any of the public offices of the parish, and that he believed it lost. That he had been diligently searching for it for a year back, but without success. The parish judge testified it was not in his office, and had not been there since he took possession of it. One of the heirs of Laurens swore it was not in his, nor did he ever see it in the hands of any of the family. The person who recorded it in the notarial record deposed that the copy produced in court was a correct copy.

We think that under the circumstances of the case the court below did not err in admitting the copy in evidence. The book, in which the original had been recorded being produced in court, it was not the copy of a copy, but the copy of the original that was offered. The instrument never had been in possession of the defendant. She appears to have taken all means in her power to procure it. The proof of loss which will authorise the introduction of inferior evidence must depend on the particular circumstance of each case.

The next question is in relation to the validity of the act. The appellant contends that

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it is an instrument *sous seing privé*, and as such could not be the evidence of a matrimonial agreement. The commencement of the act does not state, as is usually the case, that the parties came before the judge or notary.—It begins with these words "articles of agreement made and concluded, &c." and it terminates by declaring, that the parties affixed their names to it in the presence of the subscribing witness. After, and immediately following which declaration, are in these words: "done and executed before me, the date above written, James Tate, parish judge."

The only objection which we conceive can be fairly made to this not being a public act, is the deviation from the ordinary form of commencing instruments of that description. But this objection is removed by the conclusion, in which it is stated the act was made and executed before the parish judge. This declaration at the close of the instrument is entitled to as much weight, and furnishes as strong evidence of its being executed before the notary, as if the same allegations were contained in several other parts of it.

But the allegations of the plaintiff go farther

than the form in which the act was cloathed. She contends that the stipulations in it, in favor of the defendant, were null and void.

If the defendant was capable of taking from the parties, we see nothing illegal in that clause of the marriage contract by which the slaves in question were secured to the defendant. The title, it is true, was in the mother, but the father, as he styles himself, also settled property at the same time on the defendant, and he gave to the plaintiff by the contract, $1500 if she survived him.

The plaintiff, however, has resorted to a most extraordinary ground for annulling this conveyance to her child. She insists that her first husband Sims being alive at the time of the birth of the defendant, the latter was an adulterous bastard, and incapable of taking from her by donation—that the agreement disturbed the legal order of succession.

We are satisfied this ground for annulling the contract cannot avail the plaintiff: for, admitting she was legally married to Sims at the time defendant was born, the consequence would be that the defendant would be the daughter of Sims, not of Laurens, and as such

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did not lie under any incapacity to receive a donation from the parties to the contract. The law (said our code at the time of the birth of the defendant) considers the husband of the mother as the father of all the children conceived during marriage. In case of voluntary separation, access is always presumed unless the contrary be proved: the presumption of paternity is at an end, when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible. *C. Code, p. 45, art. 7, 10 & 11.*

The evidence establishes the marriage of the parties in 1806. The defendant was born in 1809. *Cooper* swears they lived together a year and then parted. *Lanier* testifies, he has not seen *Sims* since a year after his marriage. *Edwards* states he saw him in 1808 in New-Orleans, and never saw him on the east side of the lake since he went over there.—*Woods* swears they separated in 1807, that he saw Sims for a week after and never saw him since. Lanier says the plaintiff was in New-Orleans in 1807.

This is all the evidence. It creates a presumption of absence and non access: but this

will not do in cases like this. The legal presumption of the husband being the father, and of access being presumed in cases of voluntary separation, can only be destroyed by evidence bringing the parties within the exception the law has created to the rule, namely the *physical* impossibility of connexion—*moral* will not do.

Now that physical impossibility can only be shewn, by proving the residence of the husband and wife to be so remote from each other that access was impossible. The proof here wholly fails in establishing it. The evidence of the husband's residence is only negative. He was not on the east side of the lake. Where the wife was, the proof is silent. How can we tell from the evidence that they did not meet and cohabit.

We have left out of view in coming to this conclusion the fact of the mother and Laurens having declared the defendant to be their child, and of their having treated her as such. It being a perfectly well established principle in cases of this kind, that a child born during marriage cannot have its condition affected by the declaration of one or both of the spouses.—*Toullier, vol.* 2, *lib.* 1, *chap.* 2, *no.* 859.

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We conclude therefore that the mother has failed to establish that her child was an adulterous bastard, and as such incapable of receiving the donation given to her by the marriage contract. Even if she had, we have strong doubts whether such a plea could be received from her, but we do not find it necessary to decide the question.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Waggaman for plaintiff—*Hennen* for defendant.

MILLAR vs. COFFMAN.

The causes for which a reduction in the price of a slave can be claimed are the same as those for which the rescission of the sale may be demanded.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The question which this case presents is, whether the buyer of a slave afflicted with a disease, which was curable in its nature and cured, has an action in reduction of the price. The services of the slave were lost to the purchaser for about sixty days.

The court below thought he was not, and gave judgment for the defendant. The plaintiff appealed.

The judge, under the 2522d article of the Louisiana code, assimilated the action for a reduction in the price to the action for redhibition, and concluded that as in the latter action the contract could not be set aside unless the slave was afflicted with some vice or defect which rendered him absolutely useless, or his use so inconvenient and imperfect that it must be supposed the buyer would not have purchased him had he known of his imperfections; the plaintiff could not demand any reduction for a defect which did not fall within either of the causes that furnish ground for redhibition.

We think the judge did not err. The article 2522 in our opinion places the causes for reduction of price on the same ground as those of redhibition, and we are unable to say from a consideration of the proof offered in this instance, that had the plaintiff been informed of the disease under which the slave labored he would not have purchased him.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Seghers for plaintiff—*Eustis* for defendant.

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LAWRENCE
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The causes for which a reduction in the price of a slave can be claimed are the same as those for which the rescission of the sale may be demanded.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. This is a redhibitory action on the sale of a slave, stated to be affected with a rheumatism to such a degree as to render her perfectly useless and incurable at the time of the sale.

The defendant pleaded the general issue, and that the plaintiff, at the time of the sale, knew the slave to be old and afflicted with the diseases attendant on her age, which were increased by a prevalent epidemic.

The plaintiff had judgment, and the defendant appealed.

Bein, a witness for the plaintiff, deposed, he sold the slave to the defendant for $250, (the price paid by the plaintiff for her)—she was sick at the time for about a week, and the defendant attended her. She complained of rheumatism, but he thought she was more lazy than sick. He owned her during two or three years. She complained every third or fourth month, but never laid by, till her last sickness. She did not then complain of rheumatism, and

the witness thinks she had the venereal. She was able to do a good deal then, and went to market daily, washed for the children and cooked.

On his cross examination he added he saw her after he sold her. She appeared in better health than he ever saw her: he had paid $350 for her.

Boyd, an auctioneer, called by the plaintiff, deposed, he sold the slave for the defendant. She appeared old and decrepid, and walked badly. He thinks she had been offered for sale several times before. He sold her under a full guarantee, by order of the defendant, who told him she complained of being sick, but was able to do the house work. The witness thinks that, for a woman of her age, she brought as much as if she had been healthy.

Vance, a witness of the plaintiff, deposed, he owned the slave for a year, and sold her to Bein. Her general health was not very good. She frequently complained of rheumatism; but he thought her more lazy than sick. He bought and sold her with warranty.

Dr. Davidson deposed he owned the slave during the years 1819 and 1820. He sold her

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because she smoked a great deal, and was dirty in her kitchen, but was sound and healthy. He does not think he ever gave her a dose of medicine. In the summer of 1828, a rheumatic fever prevailed in New-Orleans, which was most generally epidemic, affecting persons of all ages, sexes and colours, especially the old and those who previously had rheumatic complaints. She drank freely, but was not a drunkard: she never complained of rheumatism while he owned her.

Short deposed he saw the slave soon after the plaintiff purchased her, and has since seen her often. She has been lame all the time, and during the greatest part of it very lame: her ancles are much swollen, and she has not been able to do any work of consequence.—The plaintiff has been compelled to hire another person to do the work he expected from her. She, at times, is unable to walk without a cane. She complained much of the rheumatic fever during the late epidemic, but not more than before.

Dr. Debow deposes that, in April or May last, he was called by the plaintiff to the slave, and found her affected with a chronic rheu-

matism, under which he thinks she has laboured for some time. Her case appeared of a bad character, and her disease may become incurable in aged persons who have laboured under it for a considerable time. He visited her several times, and found her by no means improved. Her limbs are much swollen, and he believes she has not been able to do the house work since he saw her.

On the cross examination he added, he told the plaintiff she might be cured by a course of medicine, which might take a month. In a woman of her age, a rheumatism such as that which she had might come on within a month or two. The epidemic that prevailed last summer aggravated a case like hers very much. He does not recollect doing any thing for her, but external applications. He does not think he observed much swelling in her limbs when he first saw her; it has occurred principally since the late epidemic. He has known a few cases in which the epidemic, when there was previous disease, has left as much swelling as there was in this slave, but the patients were not disabled from their business. He thinks

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the slave had a rheumatic complaint from the first time he saw her.

It does not appear to us that the facts in evidence state a redhibitory case. The disease, according to the testimony of the plaintiff's own witness, is such that would yield to a course of medicine, within a month. We have the testimony of most of the persons who have owned the slave since the year 1819. None of them considered her as prevented from rendering services to them as other slaves, on account of her rheumatic complaint, except the last but one, who sold her for $100 less than he had paid for her; and he swears he saw her in the hands of the defendant in a very good state of health. Slaves being human beings are necessarily liable to disease, and in old age to rheumatic affections particularly. The plaintiff bought this woman in February, and although some of his witnesses depose she was almost immediately taken with a swelling in her limbs, and thus disabled from labor, yet he called for no medical aid till April or May, and then did not accept the offer made him of a cure by a course of medicine that would have lasted one month. In the

mean while a violent epidemic raged which brought a rheumatic fever on the healthy and considerably aggravated those of the afflicted. It is not extraordinary that a decrepid old woman, sold for $250, whose owner contented himself with a few external applications, while the physician he had called recommended a course of medicine that would cure her, should be disabled by her disease, long left to itself, from labour, and smart severely under the late epidemic.

The appellee's counsel has urged that, admitting the case is not a redhibitory one, he may have damages by a reduction of the price on an action *quanti minoris*, as the petition concludes with a prayer for a general relief. In the case of *Millar* vs. *Coffman*, *ante* 556, we lately determined that the Civil Code, 2522, having provided that the action for the reduction of the price was subject to the same rules and limitations as the redhibitory, the plaintiff in the former was bound to establish every fact which was necessary to support the latter. It follows then, as it appears that the disease with which the slave was afflicted was casual, and it is not shown that at the time of the sale

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she was so sick as to render her services absolutely useless, or so much so that the vendee, had he known the state of her health, would not have bought her, he cannot complain and demand a reduction of the price.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed, and judgment entered against the plaintiff as in a case of non suit, with costs in both courts.

Christy & Cenas for plaintiff—*Preston* for defendant.

WHITE & AL. vs. *LOBRE.*

A creditor who is put on the bilan of an insolvent for part of a debt due to him, cannot afterwards sue for that part which was omitted.

More especially, if it was put down in the name of another person, and the proceedings were suffered to be confirmed without opposition on the part of the real creditor.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiffs demanded payment of two notes of the defendant executed by him previous to his having obtained the benefit of a *cessio bonorum*, on the ground that they were not placed on the bilan as creditors for these notes.

One of the notes was put on the bilan in the name of the payee. The fact of its having come into the hands of the plaintiff by indorsement does not appear to have been known to

the defendant at the time he filed the schedule of his affairs. The other note, which is for $237 58, was put down on the bilan for $237 in the name of the plaintiffs.

We think the court below did not err in giving judgment for the defendant. As to the note for $237 58, on which recovery is demanded because an error of 58 cents was committed in designating it, no observations are required from us. That however for $1000 which was put down on the bilan in the name of the payee requires some. The plaintiff has relied on the cases of *Bainbridge* vs. *Clay*, and *Herring* vs. *Levy*. It is true, that in these cases the court decided that where the insolvent issued negotiable paper he must take the risk of ascertaining in whose hands it was at the time of failure, and that if he failed to place the holder on the bilan, he could not set up the proceedings as a bar to an action by the person who had acquired a right to the paper by transfer and indorsement. These decisions, however severe they might have been as to the duty which they impose on the insolvent we still think correct. They were founded on the elementary doctrine, that no man can be

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bound by judicial proceedings to which he is not a party, or privy, a doctrine to which we are not aware there is any exception. *Vol.* 2 262. 4 *ibid.* 383.

But in neither of these cases had the party who claimed to enforce the obligations he had acquired by assignment been put on the bilan, nor did it appear he had any notice whatever of the proceedings carried on by the debtor against his creditors. In this respect the case before us presents an entirely different feature. The plaintiffs were put on the bilan and were cited as creditors. The objection therefore is not, that they were not parties to the judgment in *concurso*, but that the claim they now make never had been litigated in that suit: comparing it to an ordinary action where the judgment only applies to and protects the party against a second demand for the same thing. We do not think the principle advanced can apply to cases of this kind. When a creditor is called in, it is his duty to make known the whole amount of his claim against the insolvent. On another ground, however, these proceedings have the authority of *res judicata* against the present demand, considering the

case in the strictest and most technical point of view of which it is susceptible of being examined. The note of which they were the indorsees was puton the schedule in the name of the payees, and they permitted judgment to be rendered declaring the payees to be the holders and bona fide owners of it. In a *concurso* all the creditors are plaintiffs and defendants: plaintiffs for the amount claimed by them—defendants against the demand of the insolvent: and against the claim of each and all the other creditors. A judgment therefore recognizing other parties to have the property of the note, without any opposition on the part of the plaintiffs, bars them from setting up a subsequent claim, that it belonged to them.

It has been said, the evidence does not shew this note was put down in the name of the payees. Several notes to the amount of $3000 are placed on the bilan in their name, and we think the court below did not err in concluding that this formed a part of them: and as to the objection that it is not proved that at the time of filing the bilan the plaintiffs were the holders of the note, it is only necessary to remark that if true there was still stronger ground for

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holding the proceedings in *concurso* binding on the plaintiffs, for they could not have acquired any right to the note from the payee since the insolvency, which would authorize the institution of this suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Maybin for plaintiffs—*Waggaman* for defendant.

McMICKEN vs. *TURNER*.

Whether there be an assignment of a debt, is often a mere question of fact.

Appeal from the court of the third district, the judge of the district presiding.

PORTER, J. delivered the opinion of the court. Judgment was recovered against the defendant by one Fluker. This judgment was sold on execution by a creditor of Fluker's and the defendant became the purchaser. The plaintiff seeks by this action to compel the payment of the judgment to him, alleging that he was the assignee of the debt, and that the defendant had notice of it.

The answer contains a general denial; an allegation that by virtue of the execution issued

against Fluker, and the sale under it, the defendant had acquired all Fluker's rights, and a demand in reconvention.

The jury found against the plaintiff; the court below confirmed the verdict, and he appealed.

The question which the cause presents is whether there was an assignment of the debt to the plaintiff; for if there was, and notice was given to the defendant, he had no right to afterwards become the purchaser at sheriff's sale.

The principal evidence is contained in a letter to the defendant, and in his answer to interrogatories.

The letter is in the following words:

"Jackson, 21st April, 1825. Mr. James Turner, Sir, I have this day been called on by Mr. Charles McMicken, for money. I have it not. I have given up your note in my favour for $500, for years now standing due. I wish you to make payment, as I have waited as long as I possibly can. Should you not make any arrangement with Mr. McMicken I have desired him to put the note in suit. I remain yours. David Fluker."

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The defendant in his answer to the first interrogatory admits he received this letter. The second interrogatory enquires whether the plaintiff did not, before bringing suit in the name of Daniel Fluker against you, inform you that Fluker had given the note to the plaintiff in payment of an account and claims he had against Fluker, and did he exact payment of the note sued on from you.

To this interrogatory the defendant in substance replied, that at the time the plaintiff handed the letter, he stated that Fluker had been indebted to him for a long while, that he went to see him, and that Fluker said he had no money, that plaintiff enquired of him if he had not notes on other people, on which Fluker produced respondent's note for $500 which plaintiff took to present, and if respondent would pay it, that he plaintiff would take it, and not urge the payment, but give any reasonable time that was requested. Respondent declined, saying that he was not bound for the note. Plaintiff replied that he hoped respondent would not blame him, that his instructions were to hand it over to Mr. Barrow, to commence suit on. Respondent saw Fluker

afterwards, who told him that if the money was collected the plaintiff was only to have part of it.

In his answer to the third interrogatory the defendant admits that subsequent to the rendition of judgment against him in this court, he received a letter from the plaintiff, in which he claimed the money recovered by said judgment, alleging it to belong to him.

The fourth interogatory is "was the objection to McMicken being a witness in the suit of Fluker vs. Turner, on account of his being interested in the recovery."

To this question the defendant answers, by annexing the bill of exceptions taken on that trial, to the introduction of the plaintiff as a witness against the defendant. By this document it appears that the plaintiff was objected to, and that he swore on his *voir dire* that he was to receive the money to be recovered in this suit, provided it was recovered, but that he did not receive in payment or part payment from Fletcher—that he expected to get his debt out of Fluker, if it was not paid in the above manner, and that he was not obliged to wait with Fluker until this suit was determined.

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Whether there was an assignment of the debt or not is in this case a question of fact. There is no direct or positive evidence of a transfer. The proof adduced admits of some inferences in favor of there being one; but of more against it. The conviction produced on our minds is the same as that of the jury, and the court of the first instance. We do not believe the debt ever was assigned to the plaintiff—we think he acted as the agent of Fluker in putting it into suit and collecting it in the hope and belief that the collection of his debt would be promoted by the step he took.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Lockett for the plaintiff—*Hennen* for the defendant.

HYDE & MERITT vs. *GROCE.*

When a note is produced on which the plaintiff's endorsement exists, he may prove the indorsee was his agent, although there be no such averment in the petition.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case commenced by attachment. The counsel for the absent debtor pleaded the general issue, and a third party has interve

and claimed the property as his. We have consequently to examine the existence of the debt against the defendant, and the validity of the title to the property attached set up by the interpleader.

The suit is brought against the defendant, as partner in the house of Keep and Groce, the delivery of the goods is not much contested, but the existence of the partnership has been strenuously so. We are of opinion that the jury did not err in the conclusion they came to that there was such a firm as that set out in the petition.

There are several bills of exceptions on the record, none of which under the opinion we have formed requires a particular examination from this court, except that taken to the introduction of witnesses to prove that the indorsement of the plaintiff's on the back of the note was made to an agent for collection. In the admission of such testimony we think the court did not err, although such a fact was not specially averred in the petition; as was lately decided in the case of *Dicks, Booker & Co.* vs. *Cash*, for reasons which it is unnecessary to repeat here. *Vol.* 7, 362.

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Whether the sale of the cotton to the son in law of the defendant was simulated or in good faith, is a question of which the jury under all circumstances of the case were better judges than the court can possibly be. It is true the proof of its being so is not so strong as in many other instances of a similar kind that have come before this tribunal, but a view of the whole testimony has not brought us to the conclusion that the verdict is so contrary to evidence, as to authorize us to set it aside. Even if it did so, on another ground the plaintiff must prevail. The contract proved did not pass the property to the intervener. It was not a sale, nor a *dation en paiement*; there was no price, nor was it given in discharge of the debt alleged to be due by the defendant, to the interpleader. At the bottom of the account presented by the claimant, which purports to detail the different items by which the debt is created, there is the following acknowledgement by the defendant, "Received the above amount, which is to be deducted out of the proceeds of said cotton, and the overplus, if any, to be holden by said Wharton in right of his wife." This clearly proves to our judg-

ment that the cotton remained the property of the defendant. Had it perished on the voyage there would have been no proceeds made out of it, the loss would have been his, and he would still have been responsible for the debt due. *Res perit domino.* The case cannot be distinguished from that of *Bynum* vs. *Armstrong*, 5 *n. s.* 159.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Ripley & Conrad for plaintiffs—*McCaleb* for defendants.

HERMAN vs. *SMITH & AL.*

APPEAL from the court of the first district.

When a third party wishes to appeal from a judgment rendered between others he must shew that he is aggrieved by it.

PORTER, J. delivered the opinion of the court. The party who styles himself an intervener in this case, stated that he was aggrieved by the judgment rendered between the parties to the suit, and prayed an appeal from it. In this court his right to appeal was denied, as having no interest in the case. The cause was remanded to enable him to establish his authority to have the judgment of the court below between other parties revised at his instance. He offered proof, and the judge

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of the first instance decided that he was the *bona fide* holder of the promissory note annexed to his petition of appeal, and that so far as his interest may be affected by the judgment appealed from he is aggrieved, and if so by the code of practice has a right to appeal.

The code of practice gives the right to appeal to all parties aggrieved by a judgment between others. A man cannot be aggrieved by a right judgment, no matter what interest he may have in it. If the terms used in the code were therefore taken literally, in remanding a cause to ascertain the right to appeal, the inferior court would be compelled to examine whether the judgment it had rendered was correct. It is clear that the only enquiry when a case is remanded as this was, is, has the party applying for an appeal such an interest in the case as will cause him to sustain injury in case the judgment complained of should be erroneous. That interest appears to be recognized here so far as to enable La Porte to appeal from the judgment rendered between Herman & Smith, and seeing no ground for this appeal, it must be dismissed at his costs.

Denis for the plaintiff—*Seghers* for intervening party.

SINNOTT vs. MICHEL.

An order of seizure and sale cannot issue on property in the hands of a third person unless on the production of an act of mortgage duly recorded.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court.

The defendant resists the execution of an order of seizure and sale upon property of which she is the third possessor.

She alleges that judgment was not regularly obtained against the principal debtor. Admitting this to be true, it is immaterial; for by the late change introduced into our law, when the mortgage is established by authentic act, the creditor may enforce it on property in the hands of third persons, without any other formality than the production of the act of mortgage, making oath of the existence of the debt and giving the possessor ten day's notice. *Code of Practice*, 69, 70.

She has made other exceptions, several of which do not require our attention, there being no evidence on record to support them. There is however one of a different nature, and the question it presents offers the only difficulty in the case as it is before us.

The fourth exception is in these words:

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"That the said Nicholas Sinnott cannot maintain his present action against the respondent on the copy of mortgage annexed to the said Sinnott's petition, because the said Sinnott has not satisfied your honor that the said mortgage has ever been duly recorded, as it ought to be to bind third possessors.

The plaintiff insists, that this exception does not put the recording of the mortgage at issue. It only objects to its not being shewn to the judge before issuing the order of seizure; and this he contends the law did not require him to do.

Admitting the pleadings to put nothing else at issue, than the plaintiff admits it does, we think it presents a good exception. To entitle the creditor to the exercise of the hypothecary action, and the enforcement of his mortgage on property in the hands of third persons, it is necessary he should shew that they are affected by it: and the mere production of the act of mortgage, without evidence of its being recorded, will not authorize the issuing an order to sell property in the hands of third persons; no more than an act not importing a confession of judgment, would justify an order of seizure

and sale against the principal debtor. The court below erred in overruling the exceptions of the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; that the exception of the defendant, and injunction issued thereon be sustained, and that the appellee pay costs in both courts.

Hennen for the plaintiff—*Cuvillier* for the defendants.

McMICKEN vs. *SIMS.*

Land sold *sous seing privé* where the sale is not followed by actual delivery may be attached by a creditor of the vendor.

Appeal from the court of the third district, the judge of the second presiding.

PORTER, J. delivered the opinion of the court. The case commenced by attachment. It was levied on a tract of land. The interpleader set up title to it, by virtue of an act *sous seing privé.* The judge was of opinion that the title was completely transferred by the act under private signature, and accordingly gave judgment of nonsuit against the plaintiff.

With this opinion we cannot concur. There was no possession proved except that construc-

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tive possession which the law presumes to follow the deed. But though that is sufficient for some purposes, it is not so to enable a purchaser to protect himself against the neglect of registering his deed of conveyance.—This case cannot on principle be distinguished from *Deflechier's syndics* vs. *Degruys*, 5 M. S. 423.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided aed reversed, and it is further ordered, adjudged and decreed that the case be remanded, to be proceeded in according to law, the appellee paying the costs of the appeal.

Turner for the plaintiff.

LOISEAU vs. *LAIZER & AL.*

After two verdicts, the court in case of doubt will not interfere with the finding of the jury.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The petitioner in the year 1819 became insolvent, made a sale to his creditors of his property, and obtained from them a discharge,

The defendants were by the act of sale appointed the agents of the creditors, and intrusted with the sale of the property conveyed to them. This suit is brought to recover $2218, the value of sundry articles enumerated in the petition, which it is alleged the petitioner did not convey to his creditors, but which the defendants wrongfully disposed of.

This demand has been submitted to two juries in the court of the first instance, who have in both instances found for the defendants.

The question which the cause presents is one of fact. In the commencement of the act of sale, it is stated that the petitioner having been obliged to call his creditors together to make to them a judicial cession of his property, all his creditors, with the exception of one who was absent, had agreed to give him a complete discharge of his debts, and to abandon to him certain articles hereafter mentioned, on the condition that he would withdraw his suit in court, and make to them a private conveyance of all his property moveable and immoveable, credits, rights and actions mentioned in the original and supplementary bilan filed by him,

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with the exception of certain articles to be left to him as will be hereafter specified.

After this, follows an enumeration of the various objects conveyed to the creditors, and in this enumeration the articles mentioned in the petition are not found. On this fact the plaintiff principally relies for success. He urges that the particular mention of the property sold, controls the general clause at the commencement of the deed—and contends that the articles not specified were reserved to himself.

The creditors call our attention to a clause in another part of the deed, in which there is an enumeration of the articles which the creditors permit the insolvent to retain, and in which the property now sued for is not specified.

The general expressions in the commencement of the act might be controlled by the subsequent specification of the property conveyed, but the force of this argument is weakened if not destroyed by the enumeration of the articles retained, in which no mention is made of the articles now sued for. The things sold are not mentioned in either of the clauses where the things which he sells, and those which he

retains, are detailed. In our judgment these special enumerations control each other, and leave the general expressions in the act in full force.

This construction is strengthened by what we are bound to believe was the intention of the parties. The petitioner was insolvent. The creditors had a right to all his property. What they left to him was a mere gift on their part; and there is a strong conviction on our minds that it was in the contemplation of all, that he should surrender every thing but the articles which by name they permitted him to retain. When we add to this the fact, that this suit was commenced nine years after the sale, and that two juries have decided against it, we have had no difficulty in coming to a conclusion that the judgment of the court below must be confirmed with costs.

Soule, for plaintiff—*Moreau*, for defendants.

CANONGE vs. *LOUISIANA STATE BANK.*

If an agent for collection of a note does not know the residence of the endorser on the day after protest, but acquires a knowledge of it after, it is his duty to give notice.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendants are appellants from

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a judgment by which they were decreed to pay the amount of a note lodged for collection with them by the appellee, they having neglected to give notice to the indorser, whereby the recourse against the latter was lost.

At the trial, their counsel objected to the admission in evidence of the judgment in favour of the endorser against the present appellees, as *res inter alios acta.*

This judgment was offered to establish *rem ipsam*, i. e. that the then plaintiff, the present appellee, had failed in his attempt against the indorser: Of this it was the best evidence

On the merits, the record shews that the notary of the bank called on the Monday following a Saturday on which the protest was made at the dwelling of the endorser, found the door shut and was informed he had removed, but could not learn where from the neighbors; he made two applications without success on the same day at other places: on the next, being informed of the new place of residence of the indorser, he sent notice there; but there was no evidence of its having been delivered. The appellee introduced a witness, who deposed the indorser might have been easily found on Monday.

From this evidence the legal result is, that due diligence was used on Monday—for the oath of the notary, who swears to his inability to discover the residence of the endorser, and details the steps he took—outweigh the opinion of the plaintiff's witness who thinks the residence might easily have been discerned.

So the question is whether the notary having used diligence on Monday, there was any necessity for further steps afterwards in order to find the endorser's residence.

The protest must be made on the last of the three days of grace: that day is peremptory. If the party be not found at home, or his domicil cannot be then discovered, the protest is made and needs not to be renewed. The protest is to be given as soon as possible. Due diligence must be used on the day following that of the protest, and we do not know that it must be repeated; but if afterwards the endorser be met, or his residence discovered, he is entitled to notice.

In the present case, the notary appears to have been aware of this, for as soon as he discovered the endorser's residence he immediately sent notice there; but his duty was to *give*

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not to *send* notice only—the appellant must shew that notice was *received*, for till then it is not *given*.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Mercier for the plaintiff—*Seghers* for the defendant.

WALKER vs. *DUNBAR*. *Dicks, Booker & Co. Intervenors.*

An intervenor cannot retard the trial of a cause in which he interpleads.

APPEAL from the court of the third district, the judge of said district presiding.

PORTER, J. delivered the opinion of the court. This is an hypothecary action. The defendant pleaded that he was only a tenant at the time of the institution of the suit, and that he had given it up to another possessor. He further averred that the house of Dicks, Booker & Co. were the owners of the property, and he prayed that they might be cited in warranty to defend the suit. This answer was filed on the 12th of May, 1828.

The application to cite Dicks, Booker & Co. in warranty was opposed, and it is stated in the

record that after argument the court took time to advise. No decision appears to have been made on it; but at the following term these parties appeared, prayed leave to file their claim in intervention, and were allowed to do so.

In the answer, as it is called in this record, which the interpleaders filed, they require their vendors to be cited in warranty; and they afterwards moved that the cause might be continued, to enable them to have their warrantors cited. The court overruled the application and it is assigned as error that the judge erred in doing so.

The appellants rely on the 380th, 381st, 382d, and 383d articles of the code of practice, which confer the right on a party sued to have a continuance to enable him to cite in his warrantor.

The appellee contends that the appellants were not called in as warrantors—that they cannot be considered as defendants—that they voluntarily intervened in the suit—and that by the 391st article of the code of practice, interveners cannot retard the trial of the suit in which they interplead.

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We think as the appellants voluntarily appeared in the cause as intervenors, and not in pursuance of a citation in warranty, they must take all the responsibility which the law attaches to the character in which they thought proper to present themselves, and that the court below did not err in refusing their permission to continue the case.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Peirce, for defendants.

REPRESENTATIVES OF DICKEY vs. *ROGERS.*

Where there are several joint debtors, the surety has a right to call on each of them for the whole amount of his obligation.

APPEAL from the court of the third district, the judge of the second presiding.

PORTER, J. delivered the opinion of the court. This action commenced by attachment. The petitioner declares that he is surety for the defendant, and liable to pay the notes he has signed as such. He prays for a judgment against the garnishee for any money he may owe the defendant; and he also prays that any property in the garnishee's hands may be surrendered up to discharge the notes on

obligations for which the plaintiff is responsible.

The attorney appointed to defend the rights of the absent debtor, pleaded as a peremptory exception that from the shewing in the petition the plaintiff was surety for three other obligors, and that there is no allegation they are insolvent—and the responsibility of the plaintiff was too remote and contingent to authorize the institution of a suit.

This exception was overruled. Whereupon the attorney filed another: that from the exhibition of the obligation declared on, it appears to have been signed by the plaintiff as principal co-obligor, and that he could not maintain this action without shewing that he had paid the debt.

When the cause came on for trial, the petitioner offered in evidence the notes on which the suit had been instituted. They were objected to because they did not correspond with the allegations of the petition, which averred that the plaintiff had signed the notes as surety, when on their face they appeared to have been executed jointly and severally. The objection was sustained by the court: judgment as of

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non-suit in favor of the defendant was given, and the petitioner appealed.

We think the court below did not err in overruling the first exception filed by the defendant. The provision of our law which gives to the surety the right to sue the principal for indemnification when the debt is due, and unpaid, contains no exception, such as that contended for. Where there are several joint debtors, the surety has a right to call on each of them for the whole amount of his obligation. *Lou. Code, Art.* 3026 & 3023.

The court erred in rejecting the evidence. The general issue was not pleaded. The exception admitted (for it did not deny) that the contract, as between the parties to this suit, was one of suretyship. The contract being in *solido*, did not contradict the allegation in the petition. It often happens that the several obligors are bound in *solido* to the obligee, tho' the contract of suretyship exists between them.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. And it is further ordered, adjudged and decreed that the cause be remanded to the district court, with

directions to the judge not to reject the notes set out in the bill of exceptions, on the ground that they were contrary to the allegations in the petition: and it is further ordered that the appellee pay the costs of the appeal.

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Turner, for plaintiffs.

CORNIE vs. *LEBLANC.*

APPEAL from the court of the first district.

An agent while acting within the scope of his authority is a good witness without a release.

PORTER, J. delivered the opinion of the court. The petitioner states that one Bijotat, late of New-Orleans, being indebted to him, made his promissory note, and being on the eve of departing from the state, without leaving any property to satisfy the claim, the petitioner's agent was about to have the person of the said Bijotat arrested; that the defendant thereupon undertook and promised to pay the said note at its maturity, but that he has only paid $600 of the same.

The defendant denies all the allegations of the plaintiff, except that he paid the sum of $600 on account of the maker of the note.

On the trial, the plaintiff offered in evidence

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the agent to whom the promise had been made, in order to establish the responsibility alleged in the petition. He was objected to on the ground that he was interested in the event of the suit, because if he failed in the same, he would be liable to the plaintiff in damages for the unfaithful discharge of his mandate. The court sustained the objection, and the plaintiff excepted.

We think the court erred. The plaintiff by the petition approbating the act of the agent shews that his powers extended to taking collateral security, and the rule is that an agent while acting within the scope of his authority is a good witness without a release. 5 *n. s.* 310.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that this cause be remanded, with direction to the court below not to reject the agent as a witness. And it is further ordered that the appellee pay the costs of this appeal.

Seghers, for plaintiff—*Moreau & Soule*, for defendants.

PATIN vs. *POYDRAS*.

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The absence of attorney at public service is a good cause for a continuance.

APPEAL from the court of the fourth district, the judge of the third presiding.

MARTIN, J. delivered the opinion of the court. The appellant, plaintiff below, avers a continuance was improperly denied her.

Her affidavit stated that the counsel, whom she had employed, is absent, attending to public business as a senator, and is in possession of her papers: That she was not apprized of his intended absence early enough to send for these papers, which are necessary to her in the case—or to employ or instruct other counsel if she were able, which she is not. The affidavit had the ordinary conclusion.

The court was of opinion the counsel was bound to send the papers to the plaintiff, whose duty it was to procure other counsel.

We think the court erred. The counsel was absent on the public service. In such case it would be hard to compel suitors to be at the expense of feeing other counsel, which often, as the party swears in the present case, would not be in the client's power.

It is therefore ordered, adjudged and de-

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creed, that the judgment be annulled, avoided and reversed; the verdict be set aside, and the case remanded for a new trial: the appellee paying costs in this court.

Hiriart, for plaintiff—*Cuvillier*, for defendant.

SAUL vs. *HIS CREDITORS.*

In case of exchange, if one of the parties loses that which he was to receive, he has a right to get back the object he gave in lieu of it, altho' the person with whom he contracts is insolvent.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The creditors of Benjamin Morgan opposed the tableau of distribution filed by the syndics, claiming a privilege on certain shares of bank stock.

The facts which have given rise to the contest are as follows:

On the 8th day of November, 1822, Saul borrowed from John Jacob Astor, of New York, sixty-four thousand dollars. Thirty thousand dollars of which were for his own use, and thirty-four thousand dollars for the use and account of Benjamin Morgan. In security for the payment of this money, Saul pledged stock of the Bank of Orleans, to the amount of $64,000—$40,000 of which stood

in his own name, and $24,000 in the name of Morgan. Morgan having thus become the debtor of Saul, transferred to him in the month of January then ensuing, stock to the amount of $10,000 to replace the same quantity of Saul's, which he had pledged on account of Morgan.

On the 30th January, 1824, Saul, by act *sous seing privé*, after reciting the facts above stated, declared that "I do assign, transfer and set over to the said Benjamin Morgan, in lieu of a part of the said ten thousand dollars of stock so transferred by him to me, all my right, title and interest in two certificates lodged with the said Astor, viz: No. 36, dated the 21st of January, 1822, for 83 shares of stock, and No. 826, dated the 8th of January, 1818, for 305 shares of stock; on all of which only $25 a share has been paid, amounting together to $9,700, with full power to claim all dividends arising on the said $9,700 of stock, and with right to demand the said certificates from the said Astor at the fulfilment of the agreement entered into by the said Saul and Morgan with him, and with the full power to transfer the same to himself, or any person or persons, re-

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linquishing as I hereby do all right to ownership whatever in the said stock to the said Morgan, his heirs and assigns, having settled with the said Morgan for the difference between $9,700 and $10,000, by a separate transfer of stock, viz: 12 shares, on which is paid $25, say $300."

On the failure of Saul, Astor attempted to enforce his lien on the bank stock which had been pledged to him, but judgment was rendered against him in this tribunal, on the ground that his contract being one of pledge, it had no force or effect against creditors, unless recorded according to the laws of Louisiana. On this judgment the Bank of Orleans granted new certificates of the stock, and it was sold by the syndics of Saul's estate as making a part thereof.

The syndics of Morgan state in their petition that his estate has a privilege on the stock transferred by him to Saul, no price or consideration having been paid therefor, or that it belongs to them; or if this pretention cannot be supported in law, that then the stock transferred by Saul which was in the hands of Astor belongs of right to the creditors of Mor-

gan, and that they are entitled to the same by right of property or privilege. Both these claims are denied by the representatives of Saul's estate, and they further demand, by way of reconvention, the sum of $500, being the amount of the dividends on the stock referred to in the opposition paid by error on the 4th of October, 1826, and 9th of January, 1827, to B. Morgan, agent for the syndics of his estate.

The court of the first instance sustained the opposition; being of opinion that the estate of Morgan could not be considered as creditors, that their claim was that of a vendor who reclaims the thing sold when the price has not been paid.

From this judgment the syndics of Saul have appealed, and demand a reversal of it, on the following grounds.

1st. The appellees have no privilege as vendors of the stock transferred to Joseph Saul on the 10th January, 1824, because this was not in fact a sale made at the period of transfer but simply a replacement of so much stock which Saul had pledged, belonging to himself, for the use of Morgan, and for which

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Morgan had already received the value in the loan from Astor.

2d. If said transfer can be considered as a sale, then the price had already been paid by Saul and received by Morgan in the loan from Astor.

3d. The agreement of 31st January, 1824, is not *a transfer* by sale of 388 shares of bank stock, but merely an unexecuted agreement *to transfer*, which was never consummated, and can have no effect as regards creditors and third persons. Because there was no legal delivery, the titles, viz: the certificates, were with Astor, and no use was made by Morgan of the stock, as proprietor; it still continues to stand in Saul's name, he receiving the dividends up to the time of his failure. *C. Code*, 350, *art.* 81, 306. *arts.* 228, 229. *Lou. Code*, 2457.

4th. It is not a *dation en paiement*, delivery being of the essence of this contract. *La. Code*, 2626, 2627, 2628. *Pothier contrat de vente, No.* 601.

5th. It cannot operate as an assignment, because nothing has been done by Morgan to give it effect. No notice has been given to As-

tor, who had in his possession the certificates of the Bank of Orleans, while Saul continued to exercise acts of ownership, and receive the dividends. *C. Code*, 368, *art.* 121 *&* 122. *Lou. Code*, 1917. 4 *n. s*, 51. 5, *ibid.* 180.

6th. The agreement cannot have the effect of a pledge, there being no delivery of the certificate of stock, and not having been registered, in conformity with the provisions of the *C. Code*, 446, *arts.* 6 *&* 7, 5 *n. s.* 609.

7th. The agreement to transfer being under private signature unaccompanied by delivery, has no date against third persons, and parol proof cannot be admitted to establish its date *C. Code* 306, *arts.* 228, 229, 2 *n. s.* 171, 4 *ibid.* 368, 5 *tit.* 423.

The counsel for the appellee has declined controverting the truth of these propositions, but has contended, that the contract was one of exchange, and that Morgan not having received what he was to obtain, in lieu of that which he delivered, has a lien on the property if yet in the hands of the syndics of Saul, or on the proceeds if sold.

The counsel on the part of the appellant urges, that this was not a contract of exchange,

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because that is the giving of one thing for another. That in this instance no such contract was contemplated when Saul pledged the stock for Morgan, and that the subsequent act of Morgan's replacing it did not make it an exchange. In support of this doctrine he has relied on *Lou. Code*, 2630. *Pothier traité de vente*, 617. *Domat, liv.* 1, *tit.* 3. *Par.* 5, *tit.* 6, 4.

These authorities, with the exception of Pothier, all concur in their definition of the contract of exchange, and nearly in the same language. They state it to be an agreement between the parties to give one thing for another, except it be money. Pothier states it to be a contract where they oblige themselves to give immediately one thing for another, and he lays a particular stress on the word *immediately* in the sentence next following the definition, by observing that if we agree that I will give you one thing for a certain price, in payment of which you will give me on your side another thing, the agreement is not a contract of exchange but of sale. It embraces a sale which I make of a thing belonging to me, and a *dation en paiement* on yours.

If a contract had been proved in this instance by which one of the parties agreed to give a thing for a certain price, and receive in payment for it another, as in the case put by the author, then clearly there would not have been a contract of exchange. So if any other contract had been shewn to have been in contemplation of the parties at the time Saul advanced the stock, Morgan replaced it, and Saul again conveyed stock to Morgan, we should have given to that contract its legal effect. But in the absence of any proof to the contrary, we must conclude that the acts of the parties conformed to their previous understanding, and that was done which had been contemplated to be done. The act of Saul in advancing the stock was in nothing inconsistent with the idea of exchange, and did not necessarily throw the transaction into another class of contracts. In this view of the case there was an exchange of the one parcel of bank stock for the other, and the stock given to Morgan having been taken by the syndics of Saul, Morgan's estate has a right to get back that which was given in lieu of it, or its value. *La. Code*, 2637, 3194.

It is therefore ordered, adjudged and de-

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creed, that the judgment of the district court be affirmed, with costs.

Slidell for syndics of Saul—*Eustis* for syndics of Morgan.

NOLTE & CO. vs. THEIR CREDITORS.

A party who furnishes money for the payment of a debt is not subrogated to the rights of who is paid.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. We remanded this case, lately, with directions to have the tableau amended according to the opinion we then expressed. Vol. 8, p. 168.

Miller, one of the former appellants, complains that our directions have been misunderstood, and that as holder of a promissory note of Banks, Miller & Kincaid, by those loaned to Reynolds, and by him discounted to make money to pay workmen employed by the latter as undertaker of a house built for the insolvent, he has not his proper place on the tableau.

Our opinion declares that by an instrument executed by the appellant on the 9th of February, 1826, and filed by the appellees, he had waived any privilege as to every item of his

claim anterior to that date. By this instrument he had allowed to the appellees a right of property for a sum of $6000—viz: $720 for bricks, $2250 paid to workmen, $1500 the amount of Banks, Miller & Kincaid's note, and $1530 the amount of a note of Reynolds, endorsed by Beckman, the last note like the preceding note having been discounted in order to procure money to pay workmen employed on the buildings.

The appellant contends that having become since the proprietor of Banks, Miller & Kincaid's note—the instrument relied on is no longer in his way, as to the amount of said note—and that he is entitled thereon to the privilege which the debts paid with its proceeds have discharged—a principle which the judgment appealed from has recognized in regard to the note endorsed by Beckman.

We are ignorant of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but only to he who being bound for it discharges it. The appellant cannot therefore claim the benefit of a legal sub-

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rogation if he has shown no conventional one, the rights of the creditor paid with his money are therefore absolutely extinguished, and no part of them can be exercised by the appellant.

The document relied on shows indeed that he consented that his claims should be preferred to those then enumerated, but not that the party with whose money they might be discharged, could claim any privilege on the immeuble.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Seghers for appellant.

STEWART vs. *HIS CREDITORS.*

An imprisoned debtor who applies for the benefit of a *cessie bonorum*, cannot have his creditors called before a notary.

APPEAL from the court of the third district, the judge of the second presiding.

MARTIN, J. delivered the opinion of the court. The insolvent is appellant from a judgment by which the opposition of Mary S. Bryant, one of his creditors, to the homologation of the proceedings of the meeting before the notary, was sustained.

He was an imprisoned debtor: the creditors were therefore improperly cited to appear before a notary: all these proceedings ought to have taken place in open court, or before the judge. The act of the legislature, 2 Martin's digest, 442, requires it, and nothing authorizes proceedings elsewhere.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts, for plaintiff.

BEAUCHAMP vs. *McMICKEN.*

The action of nullity is given in case the judgment was rendered on false documents.

APPEAL from the court of the third district, the judge of said district presiding.

MARTIN, J. delivered the opinion of the court. This is an action of nullity, to set aside a judgment obtained by the defendant against the present plaintiff. An injunction was prayed and obtained to prevent its execution.

The defendant denied that the petition contained sufficient matter to justify the plaintiff's pretensions—he prayed that the injunction be dissolved and the petition dismissed. It was so done, and the plaintiff appealed.

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The suit on which the judgment was attacked for nullity in its form, was brought by the appellee on a draft of Leggo, on the appellant, and by him accepted; which draft the appellee alleged had been lost or mislaid; and he annexed to his petition his affidavit, making the loss or mislaying, in which he stated the acceptance to be in the following words: "I accept the within draft for $350, to be paid with interest at 10 per cent. a year, from the date, till paid; with the understanding that I should be legally dispossessed of the land (I purchased from the drawer) by virtue of a judgment rendered in favor of the executors of S. Gall, deceased, against my vendor and S. Adams and S. Beauchamp. The petition adds that the appellant, relying on the truth of the appellee's statement, confessed judgment accordingly, and afterwards the draft was discovered and found, and the acceptance appears to be in the following words, to wit: "I accept this order for $350 on the following conditions—to say, one half of the amount, being $175 is to be on interest at 10 per cent. from the first of February, 1822, if not paid before and upon the express understanding that no

part is liable to be paid, till a judgment for $1000 in favor of Gall's estate against Leggo and Adams be satisfied, if said judgment be a lien on the land I bought, which was rendered before my purchase. J. Beauchamp. May 11, 1825."

The action of nullity is given by the code of practice, 507, when the plaintiff obtains judgment on the production of forged documents, or other ill practices. In the present case the document was not literally forged—but it was a *false* one. Whether the plaintiff availed himself of a false document, designedly alleging the loss of the original and knowingly giving an untrue recital of its contents—or having really mislaid it erroneously stated its contents—the injury to the defendant is the same. The court who gave judgment was equally deceived in either case, by the act of the plaintiff, beyond the control of the defendant. Truth must be the basis of all judgments, and where one is obtained on false documents, made by the party in whose favor it is rendered, the detection of the falsity must entitle the opposite party to relief, even where there is no malice, in that who is in possession of the judg-

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ment. The absence of malice ought not to have any other effect than to protect the party from punishment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and proceeding to give such judgment as the inferior court ought, in our opinion, to have given, it is ordered that the judgment attacked for nullity be declared null and set aside—the injunction sustained, the appellee paying costs.

Watts & Lobdell, for plaintiff—*Turner* for defendant.

NICHOLLS vs. *PEYTAVIN.*

Where an appeal is taken for delay judgment will be affirmed with damages.

APPEAL from the court of the second district, the judge of the eighth presiding.

PORTER, J. delivered the opinion of the court. This is an action for services rendered by the plaintiff, as an attorney and counsellor at law. The defendant pleaded the general issue and prescription. The amount charged in the account is $1185.; the number of suits in which the plaintiff appeared fifteen. The court rejected all these which were bar-

red by prescription, and gave judgment against the defendant for six hundred and ten dollars.

From that judgment the defendant has appealed, and we have been unable to assign any motive for his doing so except delay. The services and their value are fully proved.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs, and ten per cent. damages thereon for the frivolous appeal.

BERGH & AL. vs. *JAYNE.*

An affidavit by an agent, that the debt is due *as he believes*, is insufficient to obtain process of attachment.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The appellants, plaintiffs below, complain that the district judge erred in dismissing their suit by attachment, on the ground of the insufficiency of the affidavit on which process had been obtained.

The affidavit was made by the plaintiffs' agent, who swears the defendant resides permanently out of the state, and is indebted to the plaintiffs in the sum of $1500, *as he* (the agent) *believes.*

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The act of 1805 (1 *Martin's Digest*, 513) authorised process of attachment on proof of the debt, and absence of the debtor, in court or at chambers in vacation.

By an act of the same year, *id.* 510, 11, clerks were authorized to take affidavits and issue process of attachment on the requisite proof being made.

In 1811, *id.* 518, and 1817, the oath of the plaintiff and of his agent were expressly admitted as proof.

The code of practice 244 requires the agent should swear on his knowledge.

The act of 1826, p. 170, requires he should swear to the best of *his knowledge and belief.*

We think, with the appellant's counsel, that we are to be ruled by the intent of the legislature, and that "nullity is not necessarily to follow the omission of any redundancy with which legislative and judicial proceedings abound;" but the intent of the law cannot be disregarded. Accordingly, in *Brides* vs. *Williams*, *vol.* 1, 98 we held the affidavit of an agent, *to the best of his knowledge*, sufficient. Knowledge *includes* belief, but not *vice versa*. We believe the arrival of a friend when we see it announced in

the gazette—we know it when we see him.—The agent believes the debt is due, when the plaintiff whom he respects tells him so—he knows it when the defendant admits it and promises payment.

We do not think the judge erred.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Strawbridge for plaintiffs—*Slidel* for defendant.